ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION IV

CA07-922

February 6, 2008

JULIA TEAGUE and MARTIN MANLEY
APPELLANTS

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES
APPELLEE

APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT
[JV-2006-59]

HON. RALPH WILSON, CIRCUIT JUDGE

AFFIRMED

Julia Teague appeals from the termination of her parental rights to JT (born 4/12/03) and JR (born 2/23/06). Martin Manley appeals from the termination of his parental rights to JR. Both argue that the evidence was insufficient to support termination. Martin also argues that he was denied assistance of counsel. We affirm in all respects.

On February 24 and 25, 2006, the Arkansas Department of Human Services (DHS), placed a seventy-two-hour hold on JT and JR based on Julia's history of using drugs and JR's being a "newborn with illegal substance/health problems." The Crittenden County Circuit Court entered an emergency order on February 27, 2006, placing custody of the children with DHS. A probable-cause order on March 22, 2006, continued custody with DHS, based on a finding that it was contrary to the children's welfare to return home. The

court ordered Julia and Martin Manley, the putative father of JR, to submit to random drug screens; submit to drug and alcohol assessment (in Martin's case, only if he had a positive drug screen); cooperate with DHS; comply with the case plan and court orders; and complete and submit affidavits of financial means and background information prior to the adjudication hearing. Julia was also directed to participate in parenting classes and substance-abuse counseling. Martin was ordered to establish paternity of JR.[1]

The adjudication order entered April 4, 2006, found that the children were dependent-neglected and reiterated the abovementioned directions to Julia and Martin. The goal of the case was reunification with the mother. A review order dated July 19, 2006, found that Julia had not maintained contact with DHS; had not maintained contact with or visited the children after they re-entered foster care following an unsuccessful trial placement; had not completed a drug and alcohol assessment or parenting classes; and had not provided documentation that she participated in or completed substance-abuse counseling. The order stated that Martin had submitted to paternity testing and maintained contact with DHS. The goal continued to be reunification with the mother.

The next review order, dated November 27, 2006, found that Julia had not complied with the case plan or court orders; had missed visitation with the children; had not completed parenting classes; and had not provided documentation that she participated in or completed substance-abuse counseling. The court noted Julia's statement at the review hearing that she

[1] James Teague was initially designated as JT's and JR's legal father but was eventually determined not to be the biological father of either child.

would be unable to pass a urine test because she would test positive for cocaine. Additionally, the court declared that it "accepted testimony of Martin Manley and Julia Teague wherein both stated that Martin Manley was the father of [JR]" and that "upon receipt of the DNA test results the Court will entertain an Order establishing Martin Manley as the biological father of [JR]."

On April 10, 2007, the court entered a permanency-planning order that changed the goal of the case to termination of parental rights. The court found that "the mother has not maintained contact with the department and has only recently submitted to a drug and alcohol assessment on February 15, 2007; the father, Mr. Manley, has tested positive for cocaine on February 1, 2007 and February 5, 2007."

Following a hearing, the court terminated Julia's and Martin's parental rights. The court found that the children had been out of the home for fifteen months and, despite a meaningful effort by DHS to rehabilitate the parents and correct the conditions that caused removal, the parents had not remedied the conditions. In particular, the court noted that both parents had been sporadic in their visitation, continued to use drugs, and had not been diligent in availing themselves of services offered by DHS. Julia and Martin appeal from the termination order.

Standard of Review

We review termination of parental rights cases de novo. *Meriweather v. Ark. Dep't of Health & Human Servs.*, 98 Ark. App. 328, ___ S.W.3d ___ (2007). Grounds for termination of parental rights must be proven by clear and convincing evidence. *M.T. v. Ark.*

Dep't of Human Servs., 58 Ark. App. 302, 952 S.W.2d 177 (1997). When the burden of proving a disputed fact is by clear and convincing evidence, the appellate inquiry is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous. *J.T. v. Ark. Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997).

Termination of Julia's Rights

Julia argues that she made numerous steps forward in the case, although she "had a few steps back." But, she contends, she made substantial progress toward complying with the case plan and should be allowed to continue reunification efforts. We find no clear error in the trial court's decision to terminate Julia's parental rights.

Any progress Julia made toward complying with court orders and the case plan occurred after the children had been out of her custody for a substantial period. She acknowledged as much when she testified that there was no excuse for her waiting an entire year to start making significant progress on her case plan. Evidence that a parent begins to make improvements as termination becomes more imminent will not outweigh other evidence demonstrating a failure to comply and remedy the situation that caused the children to be removed in the first place. *Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005); *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, 201 S.W.3d 391 (2005).

Moreover, except for a brief, unsuccessful trial visit, the children remained in DHS custody from late February 2006 through the May 2007 termination hearing, a period of over

fourteen months. During part of that time, Julia went to Alabama to visit her mother and was incarcerated on what was apparently an outstanding warrant. There was also evidence that, during the time the children were in DHS custody, Julia missed more visits with them than she attended, and some visits were cut short. Further, her drug use—the factor that caused removal of the children from her custody—continued through the latter months of the case. She told the court at the October 31, 2006 review hearing that she would test positive for cocaine, and she in fact tested positive on two subsequent occasions: on March 27, 2007, and on the date of the termination hearing. We have considered a parent's continuing drug use as a factor in support of termination. *See Carroll v. Ark. Dep't of Human Servs.*, 85 Ark. App. 255, 148 S.W.3d 780 (2004). Julia attributed her latter test result to a hydrocodone prescription, but her credibility was a matter for the court to determine. *Lewis*, *supra*.

Julia argues that DHS offered inconsistent explanations for ending her trial visit with the children in April 2006. But, resolution of inconsistencies is best left to the trial court. *Meriweather*, *supra*. She further contends that DHS "did very little" to assist her, particularly with counseling and transportation. However, the trial court made a finding of reasonable services at every juncture in the case, and Julia never questioned it. The argument is therefore being raised for the first time on appeal and need not be considered. *See Myers v. Ark. Dep't of Human Servs.*, 91 Ark. App. 53, 208 S.W.3d 241 (2005). Additionally, there was evidence that Julia was out of contact with DHS for long periods of time, and her testimony that she had no excuse for waiting so long to begin complying with the case plan belies her claim that the fault was with DHS.

Julia also points out that DHS was under a May 5, 2006 order to complete a home study on her mother in Alabama but did not do so. We are dismayed that DHS failed to obey this order and gave an after-the-fact excuse at the termination hearing that it lost contact with Julia's mother. We admonish DHS that such non-compliance, in the absence of a contemporaneous explanation to the trial court, has the look of disregard of court orders and is not a matter we take lightly. However, because we conclude that DHS's failure does not change the fact that Julia did not visit her children regularly and continued to use drugs up to the date of the termination hearing, we decline to reverse on this ground.

Termination of Martin's Rights

Martin was sporadic in his visits with JR, missing about the same number of visits as Julia. Further, he tested positive for cocaine twice in February 2007, once in March 2007, and apparently at other times in tests administered by his parole officer. Moreover, according to DHS personnel, Martin did not submit to a drug assessment after testing positive, despite court orders that he do so. In light of Martin's continued drug use, failure to comply with court orders, and sporadic visitation, we cannot say that the trial court clearly erred in terminating his parental rights.

Martin also argues that reasonable services were not provided to him, but that argument was not raised below. *See Myers*, *supra*.

Martin's Not Being Represented By Counsel

Arkansas Code Annotated section 9-27-316(h) (Supp. 2007) provides:

> (h)(1)(A) In all proceedings to remove custody from a parent or guardian or to terminate parental rights, the parent or guardian shall be advised in the dependency-neglect petition or the ex parte emergency order and the first appearance before the court of the right to be represented by counsel at all stages of the court proceedings and the right to appointed counsel if indigent.
>
> (B) A court may appoint counsel for the parent or guardian from whom custody was removed in the ex parte emergency order.
>
> (2)(A) Upon request by a parent or guardian from whom custody was removed and a determination by the court of indigence, the court shall appoint counsel for the parent or guardian from whom custody was removed in all circuit court proceedings to remove custody or terminate parental rights of a juvenile.

The February 2006 emergency order recited that the parent or guardian had a right to counsel at each stage of the proceedings and could obtain private counsel, contact Legal Services, or, if indigent, ask the court to appoint counsel. Counsel was appointed for Julia on March 22, 2006, after the court found that she was indigent. The record does not reflect that Martin requested appointment of counsel or hired his own counsel. Nevertheless, he now argues that he was denied counsel.

Martin contends that he was not declared JR's father until the termination order, and it was at that point he should have been granted the assistance of counsel. He raises this denial-of-counsel argument for the first time on appeal, so it is procedurally barred. *Myers*, *supra*. In any event, the record contains no affidavit of financial means or other indication that Martin was indigent.[2] If he was not indigent, he was not entitled to court-appointed counsel. *See Clark v. Ark. Dep't of Human Servs.*, 90 Ark. App. 446, 206 S.W.3d 899

[2] In fact, there was evidence that Martin had been employed for twenty years and was working full time, or close to it, for twenty-one dollars per hour.

(2005). Further, the court gave notice early in the case that parents and guardians had a right to counsel, and Martin does not argue that the court prevented him from hiring his own counsel. We therefore find no basis for reversal on this point.

Affirmed.

BIRD and GLOVER, JJ., agree.